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No. 90-1059

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

SIMON & SCHUSTER, INC.,

Petitioner,

—against—

RONALD ZWEIBEL, GENNARO FISCHETTI, GEORGE L. GROBE, JR., DIANE MCGRATH, and ANGELIS PETROMELIS, individually and in their capacities as members of the New York State Crime Victims Board,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF *AMICUS CURIAE* ON BEHALF OF THE ASSOCIATION OF AMERICAN PUBLISHERS, INC. IN SUPPORT OF PETITIONER, SIMON & SCHUSTER, INC.

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Preliminary Statement

The Association of American Publishers, Inc. ("AAP") submits this brief, *amicus curiae*, in support of the petition for a writ of certiorari of Simon & Schuster, Inc. ("Simon & Schuster") seeking review of a 2-to-1 decision of the Court of Appeals for the Second Circuit upholding against constitu-

tional attack Section 632-a of the New York Executive Law, New York's "Son of Sam" law.[1]

Interest of the Amicus

AAP, a not-for-profit trade association organized under the laws of the State of New York, is the major national association of book publishers in the United States. AAP's more than 225 members include most of the leading commercial book publishers in the United States, as well as many smaller and nonprofit publishers, university presses and scholarly associations.[2] Among the wide range of general and educational books produced by AAP members are diverse works dealing with the subject of crime. Such works comprehend fact and fiction, span disciplines such as history, sociology, psychology and criminology, and occupy the talents of often distinguished scholars, biographers, journalists, novelists and other authors. Countless additional works published by AAP members on subjects other than crime in some manner touch upon that topic, as a minor but relevant portion of the works.

Simon & Schuster, one of the nation's leading book publishers, urged below that the statutory provisions here in issue, by severely curtailing its and other publishers' ability to publish works dealing with crime, violate the First and Fourteenth Amendments to the United States Constitution. The majority opinion conceded the inhibiting effect of the statute, but nevertheless upheld it based upon its asserted furtherance of the compelling state interest in not rewarding criminals for their "exploitation" of their crimes so long as their victims

1 The parties' written consents to the filing of this brief are being submitted herewith to be lodged with the Clerk of the Court.

2 While Simon & Schuster is a member of AAP, this brief is motivated by the concerns of AAP's members generally as to the adverse impact of Section 632-a of the New York Executive Law upon book publishers and upon the rights guaranteed by the First and Fourteenth Amendments.

"are in need of compensation by reason of their victimization." (13a).[3] While the majority purported to apply "strict scrutiny" to a statute that admittedly burdens speech directly and targets speech of specific content (11a-13a), as Judge Newman's dissenting opinion elucidates, the searching inquiry necessitated to uphold such suspect regulation simply was not engaged in. (19a).

It is of particular importance to AAP's members that the petition for a writ of certiorari be granted in this case. New York is the center of the nation's publishing industry, and home to many of AAP's members. The legislatures of other states have patterned similar "Son of Sam" laws based on New York's "model." The Second Circuit's ruling in this case, if left undisturbed, will not only adversely affect publishing activities subject to the New York statute, but likely will have the effect of legitimizing more than 30 similar statutes in other states. *See* 59a-60a. The result will be to multiply manyfold the "chilling" effect on publication exacted by the New York law.

Moreover, the Second Circuit's facile and unanalytic approach to the "strict scrutiny" standard admittedly called for in reviewing a statute that concededly imposes a direct burden on free expression threatens to erode core First Amendment protections and itself mandates review by this Court.

The censorial impact of New York's Son of Sam law is stark and uncontested. The broad deleterious consequences for book publishers of the ruling below sustaining that law prompts this *amicus* filing.

3 Appendix references are to the appendix to the petition for a writ of certiorari.

Reasons For Granting The Writ

A. THE STATUTE IMPEDES THE CREATION OF IMPORTANT WORKS OF AUTHORSHIP

Section 632-a of the New York Executive Law (herein the "statute" or "Son of Sam" law), which prohibits a publisher from paying monies to an accused or convicted criminal with respect to a work which "reenacts" a crime or conveys that individual's "thoughts, feelings, opinions or emotions regarding such crime" (or from paying any individual who "voluntarily admits" to a crime in his or her writings), and instead requires the publisher to submit such monies to the State to be placed in an escrow fund for five years (55a), poses a direct threat to the creation and vitality of a wide variety of works. The record unequivocally supports this conclusion and the Second Circuit did not dispute it.

Crime has always been a subject of public interest and fascination, and writings about crime are a staple of our literary heritage. It is a core function of the First Amendment to enhance the public's knowledge on matters of public moment—to promote debate and guide our leaders to proper decisions. The statute here in issue—after which similar such statutes in many other states are patterned—would contract that debate, to society's detriment, by limiting the creation of works dealing with crime.

The reach of New York's Son of Sam law is nothing short of astonishing. The withholding of monies applies equally to *accused* and convicted criminals; to the "admi[ssion]" of crime in a writing; and to the most minor allusion to criminal activity in a work otherwise wholly devoted to other subjects.

The scope of works potentially interdicted by the statute is equally breathtaking. *Wiseguy*, published by Simon & Schuster and the immediate impetus for this constitutional challenge, illustrates a genre of works directly exploring the workings of organized crime. The popularity of many such works is unquestioned, as is their contribution to the public's understanding of the criminal underworld.

Many additional works have centered on the lives of notorious criminals, exploring the roots of their criminal careers, and attempting to delve into the criminal mind. Truman Capote's *In Cold Blood* and Norman Mailer's *The Executioner's Song* illustrate this genre of work.

Still other works recount accused or convicted criminals' experiences with the criminal justice system, a system which, the New York Times recently reported, has the highest rate of incarceration in the world. N.Y. Times, Jan. 7, 1991 at 14, col. 1. Some of these works have been directed to the general reading public, others to academic, professional and penological audiences.

Countless works, whose focus is *not* on crime, nevertheless recount "admissions" of prior criminal activity. For example, numerous biographies and autobiographies depict youthful transgressions, use of illegal drugs, wife beatings, and the like. Rarely are such accounts central to the works; they do, however, present a fuller picture of the biographee's background, character, and human frailties.

Works falling in each of the foregoing categories are regularly published by AAP's members. Depending, in any given instance, upon whether a particular publisher determines that the viability and/or vitality of the publishing project calls for authorship by, or collaboration with, an accused or convicted criminal within the meaning of the statute, prospective works within these categories may never be published or, if published, may be radically altered as to content. This is the direct result of the workings of the statute here under challenge.

The statute commands that proceeds, such as a royalty advance, to an accused or convicted criminal (defined to include merely one who voluntarily "admits" to a crime in the writing (57a)) be withheld and instead transmitted to the New York Crime Victims Board to be held in escrow for five years for the benefit of possible victims. The majority opinion below acknowledged that this statutory scheme has the effect of forestalling publishing projects since, "[w]ithout a

financial incentive to relate their criminal activities, most would-be storytellers will decline to speak or write." (11a).[4] The record also reveals that, even where publication plans proceed, concern over entanglement with the statute will often lead to editorial alterations unrelated to the merits of the publishing project, a form of self-censorship motivated solely by the costs, burdens, and administrative scheme of the statute. Joint Appendix for the Appeal in the Second Circuit at A73-A129.

The untoward effects of the statute are exacerbated by the fact that all manner of criminal activity comes within its purview—non-violent as well as violent, misdemeanors as well as felonies, federal as well as state, and, indeed, crimes as to which there may not even be any foreseeable victim. Crimes of conscience (*e.g.*, civil disobedience or draft resistance) are treated on the same plane as crimes of wanton violence; admitting to having smoked marijuana triggers the same statutory response as having been convicted for a bank heist.

Without compelling rationale, the statute would extract from AAP's member publishers an extraordinarily high—and in *amicus*' view, a constitutionally impermissible—price. With respect to a wide range of works dealing (whether preponderantly or fleetingly) with a "reenactment" of, or "thoughts, feelings, opinions or emotions" concerning, a crime, the State of New York—along with 34 other states—has sup-

4 The record abounds with evidence that the statute has cast a pall over numerous publishing projects. Affidavits submitted by authors, publishers, and editors detail the numerous publishing projects which prominent publishing houses have determined not to pursue because of concerns over entanglement with the statute, and several which a prominent author, Nicholas Pileggi, has declined to pursue on that same basis. Joint Appendix for the Appeal in the Second Circuit at A73-A129. AAP's members could recite many additional examples of the impact of the statute on publishing projects. In First Amendment cases, the Court regularly takes judicial notice of such likely consequences. *See, e.g., Meyer* v. *Grant*, 486 U.S. 414 (1988); *Buckley* v. *Valeo*, 424 U.S. 1 (1976).

planted its judgment as to publishing suitability for that of authors, editors and publishers.

Precisely this sort of interference with the publishing process has long been viewed as impermissible under the First Amendment. *See Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 258 (1974) ("[t]he choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment").

The adverse impact of New York's Son of Sam law and its progeny in other states upon the First Amendment rights of AAP's members and others similarly affected warrants review by this Court of the ruling below.

B. THE STATUTE CANNOT WITHSTAND STRICT SCRUTINY; THE SECOND CIRCUIT'S WATERED DOWN ANALYSIS THREATENS THE VITALITY OF THE FIRST AMENDMENT

As recognized by the Second Circuit, speech in the form of works such as *Wiseguy* is entitled to the highest degree of First Amendment protection. (10a-13a, 19a). Commentary on crime, and its implications for the criminal justice system and the quality of life in our society, is vital and deserving of presentation to the American public from as many perspectives as possible. It is through such educative process that manifold works dealing with various aspects of crime add to our storehouse of knowledge, thereby promoting better societal decisionmaking.[5]

Moreover, it is axiomatic that a statute which "single[s] out the press for special treatment," *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U.S. 575, 582 (1983), almost certainly will not withstand First

5 The broad reach of the statute to encompass works that have little to do with crime overall merely underscores why strict scrutiny is necessary—for in practice the statute interferes with all manner of serious writings, provided solely they touch on a criminal episode.

Amendment scrutiny. The court below recognized that the statute at issue does precisely that. (13a). The especial burdens placed upon book publishers and other media representatives—in attempting to comply with the vagaries of the statutory scheme, in determining whether to publish at all in the face of the law, and, if so, how to tailor a book's contents so as to keep a project viable—cannot be justified and must surely give rise to the inference "that the goal of the regulation is not unrelated to suppression of expression," a goal which is "presumptively unconstitutional." *Id.* at 585.

By prohibiting payments to accused or convicted persons due under media contracts covering expression of "thoughts, feelings, opinions or emotions" regarding a crime or containing a "reenactment" of a crime, the New York statute can be applied only after the speaker has been identified and the content of the work has been reviewed. As such, the crippling shortcoming of this scheme is that it interferes with long established First Amendment rights: it is both a content-based restriction which is unconstitutional on its face, *see Consolidated Edison Co.* v. *Public Serv. Comm'n*, 447 U.S. 530, 537 (1980) ("[a]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content")[6]; and a statute which exacts an impermissible burden on publishers and authors wishing to create and publish works beneficial to society, *see Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U.S. at 585 (1983) (a statute imposing a tax only upon the press, which differed in application among members of the press based upon content related characteristics, was held unconstitutional and found to present a threat of press censorship).[7]

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6 *See also Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 256 (1974) (a Florida statute creating a right of reply in newspapers was held unconstitutional and found to "exact[ ] a penalty on the basis of the content of a newspaper").

7 *See also First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 784-85 (1978) ("In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue").

Recognizing these direct burdens upon speech, the court below concluded that the statute must fall unless it withstood strict scrutiny. In this regard, its reasoning was unassailable. Regrettably, in purporting to apply the strict scrutiny standard, it did little more than defer to the facial language of the statute, failing utterly to place the statute under the skeptical analytical light that its speech encumbrances require.

The majority below concluded that in pursuit of its goal of compensating crime victims, New York may escrow payments to criminals which flowed from books, movies, and articles written about their crimes because such practice would indeed benefit crime victims, the ultimate goal of the statute. The court altogether avoided the strict scrutiny inquiry—whether the statute's distinctions, which were found to be both media- and content-based, were *necessary* to serve a compelling state interest *and narrowly tailored* to meet that end. *See also Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U.S. 221, 231 (1987); *Perry Educ. Ass'n* v. *Perry Local Educators Ass'n*, 460 U.S. 37, 45 (1983). Instead, and in essence, the Second Circuit appears to have been satisfied to find a rational relationship existing between the statute's ends and means.

The fundamental flaw in the Second Circuit's reasoning was pointed out in Judge Newman's dissent. By defining the State's interest being advanced in terms of the statute's stated scope, the majority reached the circular conclusion that the scope of the statute was precisely tailored to the state's objective. This analysis "eliminate[d] the entire [strict scrutiny] inquiry concerning the validity of content-based discriminations. Every content-based discrimination could be upheld by simply observing that the state is anxious to regulate the designated category of speech." (20a-21a).

This Court has routinely refused to compromise the watchful eye of the strict scrutiny test. In *Carey* v. *Brown*, 447

U.S. 455, 465 (1980), this Court rejected the argument that the statute there at issue was valid simply because prohibiting non-labor picketing in residential neighborhoods satisfies the objective of protecting residential privacy. Applying the proper, more searching analysis, this Court found the State's interest insufficient to justify the burdens it placed on the First Amendment. "[N]othing in the content-based labor–nonlabor distinction has any bearing whatsoever on privacy. . . . Standing alone, then, the State's asserted interest in promoting privacy of the home is not sufficient to save the statute." *Id.*

Meyer v. *Grant*, 486 U.S. 414 (1988), involved review of a statutory scheme prohibiting the use of paid petition circulators. Had this Court adopted the logic employed by the Second Circuit, it could have found that the State's interests in protecting the integrity of the initiative process were satisfied by the statutory scheme. This Court properly rejected such argument as insufficient, holding that it is not enough that the challenged scheme *satisfies* the state's goals. Instead, the strict scrutiny standard requires that the resulting burden on protected expression be shown to be *necessary* to fulfill the state's concerns. *Id.* at 426.

The Second Circuit's failure to apply strict scrutiny to New York's Son of Sam law should not escape this Court's review. When dealing with the precious and fragile rights afforded by the First Amendment, there can be no tolerance for a watering down of the safeguards erected by this Court designed expressly to protect the exercise of those rights. The careless (and ultimately callous) approach of the Second Circuit majority toward the protection of such rights requires prompt correction by this Court.

Conclusion

By allowing the State of New York effectively to curtail the creation of many works dealing with crime, and otherwise to influence the manner in which such works may be written

and their contents, New York's Son of Sam statute strikes at the heart of publishing autonomy guaranteed by the First and Fourteenth Amendments. The consequence of the Second Circuit's ruling will be that speech of substantial social value will never reach the public. This result will be brought about, moreover, in circumstances where there has been no showing of a compelling need for such curtailment.

The censorial effects of New York's Son of Sam law are particularly severe insofar as New York is the very center of this country's publishing industry. Not only will continued application of the statute inhibit New York-based publishing activities; it will also influence the practices of many other states which follow the pattern established by the New York law.

AAP urges this Court to take advantage of this opportunity to address a consequential issue for book publishers and others, and, through review and reversal of the ruling below, to eliminate an undue and unnecessary burden on free speech.

Respectfully submitted,

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